82-1583

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

S/S COVE RANGER her engines, tackle, boilers, equipment, furnishings in rem, COVE SHIPPING COMPANY, INC., C.M.C. TANKERS, AND C.T.S. ASSOCIATES, in personam,
Petitioners,

v.

ST. GEORGE PACKING COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED FOR REVIEW

Whether the Rule of The Steamship Pennsylvania v. Troop, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1873), continues to be the law of the land in ship collision cases involving the violation of a collision-avoidance statute or regulation.

PARTIES OF INTEREST

The following listed persons have an interest in the decision of this case.

S/S COVE RANGER

C.M.C. Tankers

Cove Shipping Company, Inc.

C.T.S. Associates

St. George Packaging Company, Inc.

Peninsular Fire Insurance Company

William D. Sheppard

Reino A. Taskinen

John Taskinen

The West of England (Luxembourg)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on December 28, 1982.

OPINION BELOW

The per curiam opinion of the Court of Appeals for the Eleventh Circuit appears in the Appendix to this Petition. The opinion rendered by the District Court for the Middle District of Florida, Tampa Division, is similarly included.

JURISDICTION

The Judgment of the Court of Appeals for the Eleventh Circuit sought to be reviewed in this case was initially entered on November 9, 1982. A timely filed Petition for Rehearing and Suggestion for Rehearing En Banc was denied on December 28, 1982. This Petition for a Writ of Certiorari was filed within ninety days of December 28, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

At 1000 hours on March 16, 1979, the Shrimp Trawler LARRY AND MABLE II collided with the Steam Ship COVE RANGER. The pending circumstances had created a crossing situation, and under the International Rules of the Road, codified at 33 U.S.C. § 1602, the COVE RANGER was the "stand-on" vessel and the LARRY AND MABLE II was the "give-way" vessel. (TR 198) Under Rule 17, the COVE RANGER was required to maintain her course and speed. (TR 187) The LARRY AND MABLE II failed to give way and struck bow first into the aft port quarter of the COVE RANGER. After the collision, the LARRY AND MABLE II sank to her main deck, and her crew abandoned her.

The LARRY AND MABLE II was a 78-foot wooden shrimp trawler which was not equipped with any type of radar. (TR 15) The master of the LARRY AND MABLE II, William Sheppard, was at the wheel at the time of the collision. (TR 20). The LARRY AND MABLE II, travelling at approximately six to eight knots, was taking spray onto the windshield of the wheelhouse. (TR 19) The combined effect of the sun and spray caused Captain Sheppard to have a problem seeing forward and to starboard.

He did not, however, post a lookout even though he knew he was traversing a shipping lane, and even though his visibility was effectively zero. (TR 55) The fishing vessel was operating under automatic pilot, and had been doing so for approximately twenty-six hours. (TR 57-58) Captain Sheppard occasionally lowered the starboard window five or six inches in order to look out. (TR 23) He did not, however, see the COVE RANGER until just before impact. (TR 30)

This case was filed in the United States District Court for the Middle District of Florida, Tampa Division, and was assigned to Senior District Judge Joseph P. Willson, sitting at Tampa by special designation. Judge Willson heard the case without a jury on March 5 and 6, 1981, and issued a "Memorandum Findings of Fact and Conclusions of Law" imposing one hundred percent (100%) of the fault and liability for the collision on the COVE RANGER and her owners and operators.

Judge Willson's decision was appealed to the United States Circuit Court of Appeals for the Eleventh Circuit. No oral argument was scheduled. The Eleventh Circuit, on November 9, 1982, rendered a per curiam affirmance pursuant to Eleventh Circuit Local Rule 25. Although the panel did not specify which subsection of Rule 25 had been relied upon, counsel's reading of the Rule would appear to indicate that the panel relied upon subsection (a), in which case, the decision to affirm without opinion was predicated on a determination that the "judgment of the District Court (was) based on findings of fact that (were) not clearly erroneous" and that "no error of law appears" in the lower court judgment. The Petitioners herein timely filed a Petition for Rehearing and Suggestion for Consid-

eration En Banc with the Eleventh Circuit, which was denied on December 28, 1982.

REASON FOR GRANTING THE WRIT

THE DECISION OF THE DISTRICT COURT AND THE ELEVENTH CIRCUIT IN THIS CASE CONFLICTS WITH ALL PRIOR DECISIONS OF THE UNITED STATES SUPREME COURT AND THE CIRCUIT COURTS OF APPEAL ON THE QUESTION PRESENTED FOR REVIEW.

The Rule Of The Pennsylvania

In 1873, the United States Supreme Court handed down its landmark opinion in the case of *The Steamship PENNSYLVANIA* v. *Troop*, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1873). The facts involved a collision between the bark Mary R. Troop and the steamship Pennsylvania. As a direct result of the collision, the bark sank and became a total loss. As its defense, the S/S PENNSYLVANIA alleged that the collision was caused by the bark's failure to keep a proper lookout, failure to blow a foghorn, and negligence in using only a warning bell placed on a stay. After finding that the bark was at fault, this Court stated:

> The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of the statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute.

86 U.S. (19 Wall.) at 136, 22 L.Ed. at 151. The Court, noting the bark's violation of navy regulations, held that

the bark failed to prove that her violation could not have been one of the causes of the collision.

This Court, on numerous occasions, has expressly reaffirmed its decision in *The PENNSYLVANIA*. *See Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 66 S.Ct. 574 (1946); *Lie* v. *San Francisco & Portland Steamship Co.*, 243 U.S. 291, 37 S.Ct. 270, 61 L.Ed. 726 (1917); *Belden* v. *Chase*, 150 U.S. 674, 14 S.Ct. 264 (1893); *Richelieu and Ontario Navigation Co.* v. *Boston Marine Insurance Co.*, 136 U.S. 408, 10 S.Ct. 934 (1889). Commenting on the force of this Court's holding in *The PENNSYLVANIA*, Gilmore and Black have stated:

> In deed a vessel at fault in connection with a collision usually derives little comfort from the rule that she cannot be held liable unless her fault contributed to the result; this contention is more often than not made futile by the so called 'Pennsylvania' rule . . . which states a drastic and unusual presumption arising on its being shown that a vessel has been guilty of statutory fault before a collision. Where this appears, the vessel thus cast in fault must prove, to escape liability, not only that the fault shown probably did not but also that it *could not* have contributed to causing the collision. This rule makes especially important the strictest compliance with the Rules of Navigation.

Gilmore & Black, *The Law of Admiralty* (1st ed. 1957), at 404-05.

The Collision-Avoidance "Lookout Rule"

Under the International Regulations for Preventing Collisions at Sea, 1972, 33 U.S.C. § 1602, Rule 5:

> [E]very vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circum-

stances and conditions so as to make a full appraisal of the situation and of the risk of collision.

How The Pennsylvania Rule Was Violated By The Courts Below

In the instant case, the district court, in its "Memorandum Findings of Fact and Conclusions of Law," found, as a matter of fact, that the *Respondent* had failed to post a lookout at the time of the collision. (See Appendix, p. 7a). In the same breath, as a matter of law, the district court held that the burden of proof was on the *Petitioners* to establish a causal connection between the Respondent's failure to post a lookout and the resulting collision! (See Appendix, pp. 7a, 13a, 14a). The *Respondent*, not the *Petitioners*, had the burden of proving that the Respondent's violation of the "lookout rule" could not have caused the collision. The district court's failure to apply the *Pennsylvania* rule, and the Eleventh Circuit's per curiam affirmance of the district court's decision, are in direct conflict with all prior decisions of this Court and the Circuit Courts of Appeal which have addressed the issue, including the Eleventh Circuit's own decision in *Orange Beach Water, Sewer and Fire Protection Authority* v. *M/V ALVA*, 680 F.2d 1374 (11th Cir. 1982). In *Orange Beach*, the Eleventh Circuit, citing *The Pennsylvania*, shifted the burden of proof to the party in violation of a maritime safety statute. As a result of the circuit court's application of the *Pennsylvania* rule, the Eleventh Circuit reversed the lower court on the basis that the defendant had failed to meet its burden of proof that the violation could not have been the cause in fact of the mishap. Further, the Eleventh Circuit's *en banc* decision in *Bonner* v. *City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), has served to adopt all of the Fifth Circuit's decisions requiring application of the *Pennsylvania* rule in circumstances such as those presented in the instant case.

A Review Of The Application Of The "Pennsylvania Rule" In The Other Circuit Courts

Nine of the United States Circuit Courts of Appeal, including the Eleventh Circuit, have endorsed the *Pennsylvania* rule as an essential sanction necessary to enforce compliance with statutes and regulations designed to promote maritime safety. The rule penalizes violators of the maritime safety statutes and regulations by imposing on them a burden of proof that may be decisive when the causes of an accident are unknown or in dispute.

In The First Circuit

The United States Court of Appeals for the First Circuit, while having only a limited opportunity to apply the *Pennsylvania* rule, has, in those instances, placed the burden of proof upon the vessel in violation of a marine safety statute, requiring the vessel to show not merely that her fault might not have been one of the causes, or that it probably was not one of the causes, but that it could not have been one of the causes of the collision. *See Seaboard Tug and Barge, Inc.* v. *REDERI AB/DISA*, 213 F.2d 772 (1st Cir. 1954) (a vessel guilty of an actual violation of a statutory rule must show that her violation could not have been one of the causes of the collision in order to escape liability); *General Seafoods Corp.* v. *J.S. Packard Dredging Co.*, 120 F.2d 117 (1st Cir. 1941) (it is well-settled that a vessel in violation of a statutory rule, intended to prevent collisions, must prove that such violation could not have caused the resulting collision).

In The Second Circuit

The United States Court of Appeals for the Second Circuit has adopted the *Pennsylvania* rule and has extended the Rule to cover not only maritime collisions between two vessels but also maritime allisions between

a vessel and a stationary object. In *Moran Towing & Transportation Co., Inc.* v. *City of New York*, 620 F.2d 356 (2nd Cir. 1980), the Second Circuit applied the *Pennsylvania* rule in a situation where a lookout mandated by 33 U.S.C. § 221, failed to adequately perform his duties. As a result of the lookout's negligence, the vessel upon which he served collided with a bridge. The circuit court found that the lookout's failure to properly perform his statutory duty constituted a violation of 33 U.S.C. § 221. 620 F.2d at 358. The *Pennsylvania* rule placed upon the vessel the burden of proving that its statutory fault, in failing to post a vigilant lookout, could not have caused the collision. 620 F.2d at 358. Since the vessel failed to meet its burden of proof, the circuit court, applying the *Pennsylvania* rule, reversed the district court's award of damages in favor of the vessel. *See generally Complaint of Tug Helen B. Moran, Inc.*, 560 F.2d 527 (2nd Cir. 1977) (under the *Pennsylvania* rule, where the violation of a statutory duty is a cause of an accident, liability may not be avoided on causal grounds by merely drawing distinctions between active and passive negligence); *Tug Ocean Prince, Inc.* v. *United States*, 436 F. Supp. 907 (S.D.N.Y. 1977), *rev'd*, 584 F.2d 1151 (2nd Cir. 1978) (the vessel's failure to post a lookout, when conditions were such that a lookout was statutorily required, was sufficient to trigger application of the *Pennsylvania* rule); *Erie Lackawanna Railway Co.* v. *Timpany*, 495 F.2d 830 (2nd Cir. 1974) (failure to post a lookout constituted a statutory violation sufficient to trigger the *Pennsylvania* rule placing the burden upon the vessel to establish that such a failure did not cause and could not have caused the accident); *Diesel Tanker F.A. Verdon, Inc.* v. *Stakeboat Number 2*, 340 F.2d 465 (2nd Cir. 1965) (under the *Pennsylvania* rule, where the breach of duty is statutory, it is the impossibility that it may have been one of the causes

of the collision that affords relief from liability for that violation).

In The Third Circuit

In *Boyer* v. *The MERRY QUEEN*, 202 F.2d 575 (3rd Cir. 1953), the Third Circuit Court of Appeals agreed with the district court that the defendant had violated the maritime statute requiring a warning whistle within half a mile of a curve or bend. As a result, the *Pennsylvania* rule placed the burden on the defendant, the MERRY QUEEN, to establish that its failure to properly give the warning whistle could not have been the cause of the collision. The district court held that the defendant had satisfied its burden of proof upon showing that it had given a warning signal a quarter of a mile from the bend. The circuit court reversed, finding that the defendant had failed to meet its burden of proof in that, had the signal been properly given, the plaintiff would have had an additional four minutes to take the necessary precautionary steps to avoid collision. 202 F.2d at 578-79. *See also Shell Petroleum Co., Ltd.* v. *Peschken*, 290 F.2d 685 (3rd Cir. 1961) (if the ship's failure to obey the bridge's signal contributed to the collision, she cannot recover by virtue of the *Pennsylvania* rule); *Tank Barge Hygrade* v. *The GATCO NEW JERSEY*, 250 F.2d 485 (3rd Cir. 1957) (if a statutory violation is alleged as the reason for the collision, the *Pennsylvania* rule requires that such alleged violation not be ignored by the court); *Tide Water Associated Oil Co.* v. *The SYOSSET*, 203 F.2d 264 (3rd Cir. 1953) (under the *Pennsylvania* rule, it is well settled that when a vessel, at the time of collision, is violating a statutory rule intended to prevent collisions, that the burden is hers to show that such fault could not have been a contributing cause); *The BOHEMIAN CLUB*, 134 F.2d 1000 (3rd Cir. 1942) (the *Pennsylvania*

rule requires a vessel in violation of a statutory rule intended to prevent collisions to establish that such violation could not have been the cause of the collision).

In The Fourth Circuit

In *Esso Standard Oil Co.* v. *Oil Screw Tug MALUCO I*, 332 F.2d 211 (4th Cir. 1964), the Fourth Circuit recognized that, under the *Pennsylvania* rule, the burden of proof is on the party in violation of a marine safety statute, especially when it is contended that the violation was a factor in the collision, to prove that such violation was not causally related to the collision. The *Pennsylvania* rule is a "salutary and fundamental doctrine." 332 F.2d at 215. Further, the *Pennsylvania* rule creates a strong presumption that the statutory fault is one of the contributing causes of the collision. *The FORT FETTERMAN* v. *South Carolina State Hwy. Dept.*, 261 F.2d 563, 569 (4th Cir. 1958). *See also Gary* v. *U.S. Oil Screw ECHO*, 334 F.2d 199 (4th Cir. 1964) (under the *Pennsylvania* rule, to escape liability for a violation of a marine safety regulation, a vessel must acquit herself of every reasonable possibility of contribution to the misfortune); *Rowe* v. *Brooks*, 329 F.2d 35 (4th Cir. 1964) (failure to comply with statutory requirements and regulations has frequently received the severest condemnation of the courts, and, when such violation is clearly established, the presumption arises that it contributed to the collision, unless the contrary is obviously apparent); *Osaka Shosen Kaisha, Ltd.* v. *Angelos, Leitch & Co., Ltd.*, 301 F.2d 59 (4th Cir. 1962) (it has long been the rule that a vessel, in violation of statute, will be held solely at fault unless the evidence to establish the fault of the other vessel is clear and indisputable).

In The Fifth Circuit

For well over fifty years, the United States Court of Appeals for the Fifth Curcuit has applied the *Pennsylvania* rule to shift the burden of proving causation on to the party who is found in violation of a maritime safety statute or regulation. Public policy reasons supporting the *Pennsylvania* rule have moved the Fifth Circuit to further extend the *Pennsylvania* rule not only to maritime collision cases between two vessels but also to maritime allisions between a vessel and a stationary object. *Florida East Coast Railway Co.* v. *Revilo Corp.*, 637 F.2d 1060 (5th Cir. 1981). *See generally Candies Towing Co. Inc.*, v. *M/V B & C ESERMAN*, 673 F.2d 91 (5th Cir. 1982) (the *Pennsylvania* rule is to be broadly applied in maritime tort actions); *Allied Chemical Corp.* v. *Hess Tankship Co. of Delaware*, 661 F.2d 1044 (5th Cir. 1981) (the time honored *Pennsylvania* rule places a heavy burden upon the party attempting to prove lack of causation between his statutory violation and the resulting collision); *Andros Shipping Co.* v. *Panama Canal Company*, 298 F.2d 720 (5th Cir. 1962) (the *Pennsylvania* rule is made applicable to the resolution of a maritime dispute upon proof that one party violated statutory safety regulations); *Republic of United States of Brazil* v. *The M/V "MARKLAND,"* 290 F.2d 165 (5th Cir. 1961) (violation of a maritime safety statute triggers application of the *Pennsylvania* rule).

In The Sixth Circuit

In *Federal Insurance Co.* v. *S.S. ROYALTON*, 312 F.2d 671 (6th Cir. 1963), the Sixth Circuit held that a heavy burden of proof rested upon the defendant, S.S. ROYALTON, to show not only that her violations of statutory rules of navigation might not have been the cause of the collision but also that her violations could not

have contributed to the collision. As a result of the defendant's failure to meet this burden, the circuit court reversed the lower court's judgment of dismissal in favor of the defendant. In remanding the case, the circuit court stated that in order for the defendant to escape liability, she must prove that the accident could not have been avoided if she had reduced her speed upon hearing the plaintiff's fog signal or if she had reversed engines when she received no assent to her passing signal. 312 F.2d at 677. *See also Reiss Steamship Co.* v. *United States Steel Corp.*, 374 F.2d 142 (6th Cir. 1967) (the *Pennsylvania* rule places a heavy burden on vessels failing to follow statutory navigational rules by requiring them to show that such fault could not have contributed to cause the collision); *Pure Oil Co.* v. *Union Barge Line Corp.*, 227 F.2d 868 (6th Cir. 1955) (the general rule in this country is that a vessel, failing to follow statutory navigation rules at the time of a collision, must prove, in order to escape liability, that such failure could not have caused the collision); *Eastern S.S. Co.* v. *International Harvester Co. of New Jersey*, 189 F.2d 472 (6th Cir. 1951) (a vessel, in violation of a statutory rule of navigation at the time of a collision, must show that such violation could not have contributed to the collision).

In The Seventh Circuit

The United States Court of Appeals for the Seventh Circuit has repeatedly held that the *Pennsylvania* rule is long-settled law that must be strictly applied. As a result of the strong public policy considerations favoring the *Pennsylvania* rule, the Seventh Circuit, along with several other circuits noted herein, has extended the *Pennsylvania* rule to maritime allisions between a vessel and a stationary object. *Complaint of Wasson*, 495 F.2d 571, 580 (7th Cir. 1974). In *Wasson*, the Seventh Circuit

held that the *Pennsylvania* rule was triggered equally by violations of federal statutes, state statutes, or local ordinances. Hence, the *Wasson* Court reversed the lower court and held that the vessel, in violation of both federal and state statutes, had failed to meet her burden of proof that her statutory noncompliance could not have been one of the causes of the collision between the barge and the bridge pier. 495 F.2d at 584. *See also First National Bank of Chicago* v. *Material Service Corp.*, 597 F.2d 1110 (7th Cir. 1979) (once statutory fault is shown, the *Pennsylvania* rule raises the presumption that the fault was, at least, a contributory cause of the disaster); *First National Bank of Chicago* v. *Material Service Corp.*, 544 F.2d 911 (7th Cir. 1976) (the *Pennsylvania* rule shifts the burden of proof in collision cases to the party in violation of a statutory navigation rule at the time of the collision); *Commercial Transport Corp.* v. *Martin Oil Service, Inc.*, 374 F.2d 813 (7th Cir. 1967) (the *Pennsylvania* rule, and the many subsequent cases following it, casts the burden of showing that a statutory violation could not have contributed to the maritime accident upon the party in violation).

In The Ninth Circuit

In *Waterman Steamship Corp.* v. *Gay Cottons*, 414 F.2d 724 (9th Cir. 1969), the Ninth Circuit Court of Appeals held that:

> [W]hen, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could

> not have been. Such a rule is necessary to enforce obedience to the mandate of the statute.

414 F.2d at 736. Further, the circuit court, citing *The DENALI*, 105 F.2d 413 (9th Cir. 1939), *rehearing*, 112 F.2d 952 (9th Cir.), *cert. denied*, 61 S.Ct. 65 (1940), held that:

> This burden is frequently extremely difficult, if not impossible, for the violator to discharge, in the nature of things; and therein lies the true penalty imposed upon him.

414 F.2d at 736. In *Waterman Steamship Corp.*, the Ninth Circuit relied on the *Pennsylvania* rule, even though the burden of proof issue was not specifically considered by the district court, and extended the Rule to cases involving a party's failure to provide its ship with navigational equipment required by statute. In making such an extension, the circuit court held that *Waterman* had not sustained the heavy burden of proof placed upon it by virtue of its failure to equip its ship as required by statute. 414 F.2d at 737. *See also Union Oil Company of California* v. *Tugboat JACINTO*, 451 F.2d 1369 (9th Cir. 1971) (under the *Pennsylvania* Rule, one vessel's violation of a statutory command is not excused merely because the fault of the other vessel, with regard to the collision, was more flagrant and shocking); *Pacific Tow Boat Company* v. *States Marine Corp. of Delaware*, 276 F.2d 745 (9th Cir. 1960) (under the *Pennsylvania* rule, the vessel guilty of violating a statute pertaining to equipment or navigation must, in order to escape liability, prove not only that the fault shown did not contribute to the collision but also that it could not have contributed to the collision); *States Steamship Co.* v. *Permanente Steamship Corp.*, 231 F.2d 82 (9th Cir. 1956) (the *Pennsylvania* Rule has been consistently followed in this circuit); *Matson Navigation Co.* v. *Pope and Talbet, Inc.*, 149 F.2d 295 (9th Cir. 1945) (under the *Pennsylvania*

rule, a vessel violating an applicable statutory rule is prima facie at fault and, to relieve herself of liability, has the burden of proving that the collision could not have been caused by such fault).

CONCLUSION

The decision of the District Court and the Eleventh Circuit in this case conflicts with all prior decisions of this Court and the Circuit Courts of Appeal involving ship collisions and the violation of a collision-avoidance statute or regulation.

For the foregoing reason, Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

/s/ Dewey R. Villareal, Jr.

DEWEY R. VILLAREAL, JR.,
Counsel of Record

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5608

ST. GEORGE PACKING COMPANY, INC.,
Plaintiff-Appellee,

vs.

S/S COVE RANGER, her engines, tackle, boilers, equipment, furnishings, in rem, and COVE SHIPPING CO., INC., in personam,
Defendants-Appellants.

U.S. Court of Appeals
Eleventh Circuit
FILED
DEC 28 1982
Norman E. Zoller
Clerk

Appeal From The United States District Court For The Middle District Of Florida

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion November 09, 1982, 5 Cir., 198__, ____ F.2d ____).
(December 28, 1982)

Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court

having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ ALBERT J. HENDERSON

United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5608
Nonargument Calendar

D.C. Docket No. 80-134-Civ-T-GC

ST. GEORGE PACKING COMPANY, INC.,
Plaintiff-Appellant,

versus

S/S COVE RANGER, her engines, tackle, boilers, equipment, furnishings, in rem, and COVE SHIPPING CO., INC., in personam,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA.
November 9, 1982

Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

PER CURIAM

AFFIRMED. See Local Rule 25.
"Costs taxed against defendants-appellants."

ISSUED AS MANDATE: January 14, 1983.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 79-586- Civ.T-GC

ST. GEORGE PACKING COMPANY, INC.,
Plaintiff,

versus

S/S COVE RANGER, her engines, tackle, boilers, equipment, furnishings, *in rem, et al.*,
Defendants.

MEMORANDUM
FINDINGS OF FACT AND CONCLUSIONS OF LAW
JUDGMENT ORDER

Upon completion of all potential proceedings, this civil action was assigned to the undersigned sitting at Tampa by special designation. A bench trial was had which was completed March 6, 1981. The following facts were admitted in evidence in the pretrial stipulation:

"1. Shrimp Trawler LARRY AND MABEL II was owned by ST. GEORGE PACKING, CO., INC.

"2. On March 16, 1979, the date of the collision, SS COVE RANGER was owned by C.T.S. ASSOCIATES, a partnership. C.M.C. TANKERS is the successor to C.T.S. ASSOCIATES and ownership of SS COVE RANGER was transferred to C.M.C. TANKERS on September 4, 1979. COVE SHIPPING INC. is the operator of SS COVE RANGER and employed the Master, officers and crew of SS COVE RANGER on board said vessel at the time of collision.

"3. It is admitted that at 1000 local time March 16, 1979 Shrimp Trawler LARRY AND MABEL II and SS COVE

> RANGER collided at Lattitute [sic] 24° 31 North, Longitude 83° 28 West, a position approximately 30 nautical miles West by South of Dry Tortugas and as a consequence of collision Shrimp Trawler LARRY AND MABEL II sank and became a total loss."

At the conclusion of the trial, I was convinced that the decision must be for the plaintiff and against the S/S Cove Ranger and its owners with no fault or neglect in navigation and management of the shrimp trawler assessed against plaintiff. Based upon the evidence in this case, this Court is convinced that the cause of the collision was the failure of the Third Mate on the S/S Cove Ranger to sound a warning signal as he approached the trawler Larry and Mabel II. As Judge Markey says in his article in 80 F.R.D. 203, 218, I was ready with the decision at the trial's close. But the practice is, of course, that the Findings and Conclusions must be written and transcribed.

The Court in this case has been favored by the presence of learned and expert admiralty counsel. The issues have been sharply presented by both litigants by their counsel. Trial briefs were prepared and proposed findings and conclusions, as well as post-trial briefs have been filed, served, and have been carefully examined. I am in accord with the summary of plaintiff's counsel where he speaks of circumstances leading to the collision. He has said and this Court adopts his summary as Findings of Fact in part:

> "COVE RANGER and LARRY AND MABEL II collided at 1000 hours on the morning of March 16, 1979 on the high seas approximately 30 nautical miles Westerly of Dry Tortugas Lighthouse. The weather was bright and clear. There was a rough Northeasterly sea running with Northeasterly winds of 25 miles per hour. LARRY AND MABEL II was proceeding Northeasterly toward Ft. Myers into the rough head seas. She was underway in company with another trawler owned by Plaintiff. She was shipping seas over her starboard bow and down her starboard making visibility to starboard difficult. She was totally unaware of the presence of COVE RANGER until an instant before collision.
>
> "COVE RANGER was underway toward Corpus Christi at full sea speeds and making 16.2 knots. In view of her size

and the height of her navigation bridge above the water, her third officer was unaffected by existing sea conditions and had visibility all around the horizon for some 14 nautical miles.

"The third officer on board COVE RANGER visually sighted LARRY AND MABEL II a full twenty minutes before collision at a distance of 5 to 6 miles off the port bow of his vessel. He continued to observe the trawler visually for the ensuing twenty minutes until the vessels collided at 1000. The only thing the third officer did on the COVE RANGER was to order the ship hard right at two minutes before collision. During the preceding eighteen minutes before the hard right order, he did absolutely nothing but stand by and watch a dangerous situation become a collision. What is unusual in this case is that a collision was permitted to occur notwithstanding the numerous opportunities open to the COVE RANNER [sic] to avoid the trawler. The reason that the collision did occur was because the third officer on COVE RANGER failed to appreciate the special circumstances of the case; failed to exercise fundamental seamanship; failed to utilize the numerous means at his disposal to determine if risk of collision existed and to take means to avoid that risk; failed to sound a danger signal; and failed to blow a one blast signal when he changed course to starboard two minutes before collision.

"The fundamental error of COVE RANGER'S third officer was his startling insistence on maintaining what he perceived to be his ship's 'right-of-way' into collision. For her numerous statutory violations COVE RANGER must bear the fault for this collision."

For the defendants it seems conceded that the S/S Cove Ranger, due to the lack of seamanship of the Third Mate, must be held responsible in part for the collision. But Kenneth G. Hawkes, Esquire, for the defendants, attributes some of the cause of the collision to the lack of a lookout on board the Larry and Mabel II. He summarizes the testimony as to this contention as follows:

"William Sheppard was the master of the LARRY AND MABEL II. Captain Sheppard testified that he has operated shrimp boats for eighteen years, and that he has also operated tugs in Houston and on the Great Lakes. He

testified as to the conditions in the wheelhouse from the time he went on watch until the time of collision. He testified that the visibility was severely reduced to starboard owing to the angle of the sun and the spray on the windshield. He admitted that he was aware, for several hours preceeding the collision, that he was crossing a shippng lane which would take him approximately 6 hours to cross. He knew that large ships traversed that shipping lane from both directions, that if a vessel approached from his starboard he would have to give way, and that he could not see to starboard. Notwithstanding all of this, he did not post a look-out. He did not post a look-out because there was no place on the boat where a look-out could stand without getting wet.

"Reino Taskinen was one of the two deckhands onboard at the time of the collision. He testified that he was in the galley at the time of the collision. He confirmed that the "trawler was taking on water from the starboard, but he also stated that the port side was relatively dry. He admitted that a loo-out [sic] could stand on top of the wheelhouse."

Based upon all the evidence in this case, however, it was my conclusion at the trial that the failure to post a lookout was excusable but that the failure of the Third Mate on the S/S Cove Ranger to sound a danger signal and to give a one blast signal thereafter was the sole and proximate cause of the disaster. It is, of course, true that the vessels were in the traffic shipping lane on a bright clear day, but the construction and size of the trawler moving in heavy seas with a constant spray over her bow was ample reason for the lack of a lookout. A lookout on the trawler would have been in a dangerous position during the interval prior to the collision.

In reviewing the post-trial briefs filed by counsel for each of the parties, the Court has selected portions of the summary by Jack C. Rinard, Esquire, counsel for plaintiff, as being a correct summary of the evidence and the conclusions, and they appear in the Appendix attached hereto which are adopted as the Findings and Conclusions of the Court both as to liability and damages in this case.

In preparing this decision favoring plaintiff, the Court has not overlooked the proposed findings and conclusions submitted by Mr. Hawkes for defendants. He contends that the primary cause of the collision was the failure of the trawler to maintain a proper lookout as required by Rules 5, 15, and 16, and the failure amounted to a violation of Rules 15 and 16 and was the reason why the trawler failed to give way as required, and further that the trawler was in violation of Rules 2 and 7 of the International Rules of the Road. He contends that the S/S Cove Ranger complied with Rule 17 by maintaining her course and speed and by altering her course to starboard in an attempt to avoid a collision. Mr. Hawkes for defendants cites *United States* v. *Reliable Transfer Company, Inc.*, 421 U.S. 397 (1975), contending that liability must be allocated between the parties proportional to the comparative degree of their fault. He urges that the Court find the S/S Cove Ranger but 25% at fault and, of course, the trawler, 75% at fault. But contrary to Mr. Hawkes' contentions I conclude that there can be no negligence attributed to the trawler, which would amount to the proximate cause of the collision. The proximate cause of this collision was the act of the Third Mate on the S/S Cove Ranger, all as outlined in plaintiff's brief and summary in the Appendix.

On the issue of damages, there is no substantial dispute. As the collision was the sole fault of the S/S Cove Ranger and the trawler became a total loss, plaintiff is entitled to full recovery and prejudgment interest. Based on the evidence, these damages are as claimed, that is:

Market value of LARRY AND MABEL II at time of loss		$140,000.00
Market value of catch of shrimp on board		17,196.00
Crew effects:		
William Sheppard	$ 287.00	
Jon Taskinen	1,307.00	
Reino Taskinen	264.00	1,858.00
Fuel oil on board trawler (3,600 gallons at 47¢ per gallon)		1,700.00
	TOTAL:	$160,754.00

Based upon the decisions of the Court of Appeals, *Complaint of M/V Vulcan*, 553 F.2d 489, (1977), and *Gulf Oil Corporation* v. *Panama Canal Company*, 481 F.2d 561, (1973), prejudgment interest is allowed in accordance with the claim made by plaintiff.

In accordance with Rule 52, this Memorandum includes the Findings of Fact and Conclusions of Law.

An Order for judgment follows.

APPENDIX

I. The Fault of COVE RANGER.

The facts and circumstances leading to collision between LARRY AND MABEL II and COVE RANGER are set out in detail in Plaintiff's contentions contained in the Pre-Trial Stipulation. The facts leading to collision are also set out in Plaintiff's Trial Memorandum. The evidence of the witnesses at trial fairly support the contentions of Plaintiff and demonstrate that the collision was caused by the hopeless navigation of the COVE RANGER's Third Mate, Michael Power. Indeed, in view of Mr. Power's trial testimony the contentions of Plaintiff are, if anything, woefully understated.

The Third Mate was confronted with a situation on the morning of March 16, 1979 which required him to act reasonably, responsibly and in a seamanlike manner. But he did nothing. Twenty minutes before collision he sighted LARRY AND MABEL II heading into rough Northeasterly seas and taking spray on deck. He testified it was not necessary to take visual bearings using the COVE RANGER's azimuth circle and gyro repeater to determine if there was risk of collision because he could accomplish the same thing from the ship's wheelhouse by lining up a bridge window frame with the fishing vessel. Neither he nor any other of Defendants' witnesses were able to explain how this "eyeball" method equalled or exceeded taking actual bearings or displaced the mandate of Rule 7(d) that such bearings be taken. 33 U.S.C.A. § 1601 *et seq.* It is obvious that the Third Mate's method was ridiculously inaccurate inasmuch as it furnished the basis for the bearings and ranges contained in the Third Mate's statement (Plaintiff's Exhibit 2); those observations were demonstrated at trial to be totally erroneous. (Plaintiff's Exhibit 17)

Using his "eyeball" method of taking bearings the Third Mate testified at trial that he observed a "slight" bearing change to the left. This would indicate that the vessels would clear one another with the COVE RANGER passing ahead of LARRY AND MABEL II. In point of fact, the vessels had to have

been on a collision course, with the relative bearings between them virtually unchanged, or there would have been no collision. This fact was explained by Captain E. B. Hendrix and was demonstrated by Captain Hendrix' plot working backwards from the time of collision at 1000. (Plaintiff's Exhibit 18).

COVE RANGER was in the open waters of the Gulf of Mexico (Plaintiff's Exhibit 1) and there was nothing to prevent the Third Mate from directing her course in any direction necessary to avoid risk of collision.

LARRY AND MABEL II could have received a radio call from COVE RANGER prior to collision and was monitoring the calling frequency. But the Third Mate did not even consider raising the trawler by radio because in his experience fishing vessels sometimes "don't answer." Mr. Power's reservoir of experience at sea was certainly less than vast; he was in his 36th day on his first job as a Third Mate. LARRY AND MABLE II was a fishing vessel that would answer a radio call—her Captain was listening.

John Flanagan, Master of COVE RANGER, testified that one of his standing orders to the officers of COVE RANGER was to call him to the bridge at any time when there was doubt. The Third Mate never called Captain Flanagan because, as the Third Mate put it, he was not in doubt until the last minute. It is perfectly obvious that the reason Mr. Power was not in doubt until it was too late to act is because of his eyeball bearings of the fishing trawlers which led him to erroneously conclude that the vessels would clear one another. Had he taken the bearings required by steamship and the Rules of the Road he would have perceived that risk of collision existed and, perhaps, taken some action.

Captain Flanagan testified that another standing order on COVE RANGER is to give all traffic a wide berth; that small vessels usually keep out of the way of large ships such as COVE RANGER but when they do not, COVE RANGER moves out of the way. Moreover, Captain Flanagan blows danger signals when small vessels approach within one-half mile of COVE RANGER.

He also pointed out that the maneuvering signals required by the Rules of the Road, Rule 34, are also given by COVE RANGER. The Third Mate gave no whistle signals, neither the maneuvering signal when he went hard right at 0958 nor the danger signal at any time. His reason for failing to blow the danger signal was that he was in an "excited state." One point is firmly established in the evidence. Had LARRY AND MABLE II received a warning of COVE RANGER's presence as short as a minute before collision the trawler could have been stopped and the collision avoided.

According to the Third Mate, LARRY AND MABEL II was approximately 2 points forward of the port beam of COVE RANGER at a distance of 4 ships lengths, approximately 2,500 feet, when he decided to go hard right. Again, the observations of Mr. Power were demonstrated to be wholly inaccurate. At trial he agreed that at an estimated speed of 5 knots for LARRY AND MABEL II it would have taken the trawler five minutes to cover the 2,500 feet to COVE RANGER and during that period COVE RANGER would have proceeded on her tract at the rate of 1,600 feet per minute. In other words, given his observation, there could have been no collision!

Captain E. B. Hendrix explained how the collision had to have occurred. The two vessels were on collision course with their relative bearings unchanging. COVE RANGER went hard right at a point when LARRY AND MABEL II was approximately 2 points off the port bow of the tanker at a distance of slightly more than one-half mile. The hard right rudder caused the tanker to turn, as ships normally do, about her pivot point located in the fore part of the vessel. Most of her length was swinging through the water directly toward the trawler. The trawler was initially stuck on its starboard outrigger and spun into the tanker well aft on the tanker's port quarter. Impact occurred at 1000, two minutes after the hard right order was given. These facts demonstrate that any brief reduction in the headway of the trawler following a warning of COVE RANGER's presence would have averted collision. The danger signal, which the Rules absolutely require to be given in such circum-

stances, would have furnished the requisite warning. Rule 34(d), 33 U.S.C.A. § 1601 *et seq.*

The neglect, mismanagement and lack of seamanship on the part of COVE RANGER's Third Mate was total and unmitigated; the faults of the Third Mate were the sole cause of the loss of LARRY AND MABLE II.

II. Did LARRY AND MABLE II Fail to Post a Lookout?

From their opening statement through a brief closing argument Defendants have conceded that COVE RANGER was at fault for the collision. However, Defendants suggest that her fault contributed only 25% to collision and that LARRY AND MABEL II must bear 75% of the loss for failure to post a lookout. Based on the evidence in the case and the utter failure of the Third Mate of COVE RANGER to take any meaningful action to avoid collision, Defendants' suggestion is, with respect, total nonsense.

Defendants argue that the comparative negligence rule now applicable in cases of collision, laid down by the Supreme Court in *United States* v. *Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), requires the Court to look at the action of both vessels involved in collision and to determine whether the acts of either, or both, contributed to collision, and if so, to allocate fault accordingly. Plaintiff has no quarrel with that statement of the law. The difficulty is that the law must be applied to the facts of this collision. The question therefore is whether LARRY AND MABEL II failed to post a lookout and, if so, did that failure contribute to collision and, again, if yes, to what degree?

The burden is of course on Defendants to establish that no lookout was posted on LARRY AND MABEL II and to also establish that such failure contributed to collision. Had no lookout in fact been posted on the trawler Plaintiff would concede that there was fault contributing to collision. But, the significant evidence in this case is that Captain Sheppard was on lookout, and was endeavoring to see any traffic in the area. Given the circumstances in which the trawler was operating, and the fact

that the vessels were on collision course, COVE RANGER was constantly on a relative bearing approximately 4 points off the starboard bow of the trawler, squarely in the area of worst visibility caused by the water the trawler was shipping and the reflected sunlight. As Captain Sheppard testified, he was looking out and he could see as well as anyone else he could have positioned on the trawler.

Captain Sheppard testified he could not put anyone on the bow of the trawler because she was plunging into the seas. Similarly, no-one could be lookout on top of the trawler for fear of going overboard. Defendants suggest that someone could have been posted on the trawler's after deck, but to what avail was never explained. The fact is LARRY AND MABEL II did have a lookout and that lookout, Captain Sheppard, was positioned and keeping the best lookout which the existing circumstances permitted.

The evidence completely refutes Defendants' contention that there was no lookout on LARRY AND MABEL II and Defendants have failed to carry the defense that the failure to post a lookout causally contributed to the collision. The only possible argument left to Defendants is that LARRY AND MABEL II must be faulted in some measure because Captain Sheppard, despite the fact that he was looking out, did not see the tanker. But such an argument must also fail. Before LARRY AND MABEL II can be found at fault, Defendants must establish some negligence. There clearly is no evidence in this case that Captain Sheppard did not see the tanker due to any negligence on his part or on the part of his crew. His failure to see the COVE RANGER was due to the circumstances under which the trawler was operating. Moreover, those circumstances were open and obvious at all times to the tanker's Third Mate.

There was no fault on the part of the trawler causally related to collision. The collision was solely caused by the multiple failure of Third Mate of COVE RANGER to apply the Rules of the Road and fundamental principles of seamanship.

III. Plaintiff's Damages.

Plaintiff proved damages in the total principal sum of $160,754.00 consisting of the following items:

Market value of LARRY AND MABLE II at time of loss		$140,000.00
Market value of catch of shrimp on board		17,196.00
Crew effects:		
William Sheppard	$ 287.00	
Jon Taskinen	1,307.00	
Reino Taskinen	264.00	$ 1,858.00
Fuel oil on board trawler (3,600 gallons at 47¢ per gallon)		1,700.00
	TOTAL:	$160,754.000

Defendants offered no testimony or evidence whatsoever on the issue of Plaintiff's damages. Defendants had no comment or criticism with respect to the value of the catch of shrimp or in connection with the claim for crew effects. Defendants did suggest that the trawler would have utilized some portion of the 3,600 gallons of fuel on board had she been able to travel on to Fort Myers Beach; but, the record was subsequently clarified and it is a fact that the trawler had sufficient fuel in her other tank to carry her to Fort Myers and would have arrived there with her two tanks containing 3,600 gallons intact.

Defendants suggested (but offered no testimony or evidence on the point) that the market value of LARRY AND MABEL II should be $130,000.00 as found by the marine surveyor when she was appraised in November, 1978, and argued that the $10,500.00 expended for a complete engine overhaul did not increase her market value. Plaintiff fails to appreciate the logic of Defendants' argument. Obviously, market value is depen-

dent upon the condition of the vessel. Mr. Villers testified that engines on Plaintiff's trawlers need be overhauled approximately every three years. Certainly, if a trawler had just completed such an overhaul at an expense of $10,500.00, that fact could only increase her market value, not leave it unaffected. The uncontradicted testimony in the case is that the trawler was in good sound condition at the time of her loss and at that time the cost of a new wooden trawler was approximately $200,000.00. Soon after the collision, Plaintiff replaced LARRY AND MABEL II with a fiberglass trawler at a cost substantially in excess of $200,000.00. Given all of the circumstances, Plaintiff submits that its claim of $140,000.00 as the market value of LARRY AND MABEL II as of the date of her loss is fair and reasonable.

Plaintiffs' trawler was a total loss and in such cases the measure of recovery is market value plus interest. *Standard Oil Company* v. *Southern Pacific Company*, 268 U.S. 146, 155-156 (1925). Interest on the market value is an element of damage. *O'Brien Bros., Inc* v. *The Helen B. Moran*, 160 F.2d 502, 506 (2d Cir. 1947). At trial Plaintiff made it clear that it does not seek anything for loss of use of LARRY AND MABEL II; that is seeks only its market value plus interest. Plaintiff proved that at the time the LARRY AND MABEL II was lost it was paying interest rates of 11 1/4% to finance its fishing vessels. Plaintiff seeks, and is entitled to receive, interest on the market value of the trawler from the date of her loss on March 16, 1979 at the rate of 11 1/4% until paid. See: *Sabine Towing and Transportation Company, Inc.* v. *Zapata Ugland Drilling, Inc.*, 553 F.2d 489, 491 (5th Cir. 1977). With respect to its other element of damage, loss of catch, crew effects and value of the fuel oil on board the trawler, Plaintiff is entitled to prejudgment interest at the prevailing rate of 8%. *Gulf Oil Corporation* v. *Panama Canal Co.*, 481 F.2d 561 (5th Cir. 1973).

No. 82-1583

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

S/S COVE RANGER, her engines tackle, boilers, equipment, furnishings *in rem*, COVE SHIPPING COMPANY, INC., C. M. C. TANKERS and C. T. S. ASSOCIATES, *in personam*,
Petitioners,

v.

ST. GEORGE PACKING COMPANY, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT, ST. GEORGE PACKING COMPANY, INC., IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

SHOULD THIS COURT EXERCISE ITS DISCRETIONARY CERTIORARI JURISDICTION TO DETERMINE WHETHER THE RULE STATED IN *THE STEAMSHIP PENNSYLVANIA v. TROOP*, 86 U.S. (19 Wall.) 125, 22 L.ed. 148 (1874), CONTINUES TO BE THE LAW OF THE SEA WHERE (1) THAT RULE, IN ORDER TO BE INVOKED, REQUIRES THE VIOLATION OF A COLLISION-AVOIDANCE STATUTE, AND (2) THE DISTRICT COURT ON UNDISPUTED EVIDENCE DETERMINED THAT THERE WAS NO STATUTORY VIOLATION, WHICH DETERMINATION WAS AFFIRMED BY THE COURT OF APPEALS UNDER THE CLEARLY ERRONEOUS STANDARD OF REVIEW?

PARTIES OF INTEREST

The following listed persons and entities have an interest in the decision of this case.

S/S COVE RANGER*

C. M. C. TANKERS*

COVE SHIPPING COMPANY, INC.*

C. T. S. ASSOCIATES*

ST. GEORGE PACKING COMPANY, INC.*

PENINSULAR FIRE INSURANCE COMPANY

WILLIAM D. SHEPPARD

REINO A. TASKINEN

JON TASKINEN

THE WEST OF ENGLAND (LUXEMBOURG)

WORLD WIDE MARINE INSURERS, INC.

*The actual parties to this action as listed in the caption of the case in this Court.

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TABLE OF AUTHORITIES

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NO. 82-1583

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STATUTORY PROVISION

This litigation involved the correctness of the District Court's determination of no statutory violation of Rule 5, International Regulations for Preventing Collision at Sea (1972), 33 U.S.C. §1602:

> Every vessel shall at all times maintain a proper lookout by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.

STATEMENT OF THE CASE

Course of Proceedings Below

Respondent, St. George Packing Company, Inc., owner of Shrimp Trawler LARRY AND MABEL II, brought an action in admiralty for damages stemming from a maritime collision in the United States District Court for the Middle District of Florida, Tampa Division, against Petitioners here, S/S COVE RANGER, *in rem*, and Cove Shipping Company, Inc., *in personam*. (R. 1).[1] The pleadings were subsequently amended with the addition of Petitioners here, C. T. S. Associates and C. M. C. Tankers, as party Defendants. (R. 28, 30). C. T. S. Associates' counterclaim for wrongful arrest of the S/S COVE RANGER was dismissed by the District Court during trial (TR. 159-165), and an Order confirming dismissal was subsequently entered. (R. 62).

Respondent's claim was tried in Tampa, Florida, on March 5 and 6, 1981 (R. 63), before the Honorable Joseph P. Willson, in admiralty, without a jury. The respective parties submitted post-trial memoranda together with proposed findings of fact and conclusions of law. (R. 54, 55). The District Court, on May 15, 1981, entered its Memorandum findings of fact and conclusions of law determining that S/S COVE RANGER was solely at fault for the collision. (R. 56; PA. 4a-16a). Judgment order was entered accordingly. (R. 57).

1/ References are to the Record (R.) as paginated in the Court of Appeals. (TR.) = Trial Transcript (R. 63) separately paginated. Plaintiffs' trial exhibits (PX.) were not independently numbered in the Record. (PA.) = Appendix to Petition for Writ of Certiorari; (RA.) = Appendix to this Brief in Opposition.

Appeal was taken to the United States Court of Appeals for the Eleventh Circuit by notice filed June 15, 1981. (R. 59). The Circuit Court affirmed the judgment without oral argument and without an opinion under Eleventh Circuit Local Rule 25.[2] (PA. 3a).

A Petition for Rehearing and Suggestion for Consideration En Banc were denied on December 28, 1982. (PA. 1a - 2a).

Statement of the Facts

Petitioners avoid the facts as found by the District Court and affirmed by the Eleventh Circuit (PA. 4a - 16a) in favor of an incomplete, erroneous and selective combing of the testimony and findings of the District Court.

The collision occurred approximately 30 nautical miles west of Dry Tortugas. The time of and position of the collision and the fact that LARRY AND MABEL II was a constructive total loss were stipulated. (R. 56; PA. 4a - 5a). The finding of fault on behalf of the S/S COVE RANGER is not at issue.

LARRY AND MABEL II was a wooden hulled shrimp trawler 78 feet in length. PX. 7 and 8 (TR. 33-34; RA. 1-2) depict photographs of a shrimp trawler named TOM AND BOBBIE which is identical in size, construction and configuration to LARRY AND MABEL II. (TR. 14-15, 20-21). LARRY AND MABEL II was in the charge of Captain William B. Sheppard and two crewmen, Reino and Jon Taskinen, returning from the fishing grounds in Contoy, Mexico, to Ft. Myers, Florida. She was traveling in the company of the shrimp trawler DEBBIE

2/ Rule 25, as applicable to this case, provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

* * *

and the court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

AND ADDISON which was positioned on the port beam of LARRY AND MABEL II approximately ¾ to one mile distant. (R. 14-16).

COVE RANGER is a 29,000 ton tank ship 654 feet in length and 78 feet in beam propelled by a 12,500 horsepower steam turbine. (TR. 88). On the morning of March 16, 1981, she had passed abeam Dry Tortugas at 0819 hours and set a gyro course of 280 degrees toward Corpus Christi, Texas (TR. 181), making a full ahead speed of 16.2 knots. (TR. 92, 97).

The watch on board COVE RANGER consisted of Michael Power, the Third Mate (TR. 90, 180), and an able bodied seaman. (TR. 182). On the morning of the collision Mr. Power was beginning only his thirty sixth day as an officer in charge of the watch on a seagoing vessel. (TR. 193). Mr. Power's duty as Third Mate included using all means available to him to keep COVE RANGER from risk of collision. (TR. 106). By standing orders of the Master of the COVE RANGER, Captain Flannagan, Mr. Power was charged with giving "all traffic a wide berth" (TR. 95), and sounding the danger signal for small vessels approaching within one-half mile of COVE RANGER. (TR. 207).

LARRY AND MABEL II was encountering northeast winds of 25 miles per hour and rough northeasterly seas of 6 to 8 feet. (TR. 17). As a result she was pitching into the seas, rolling, and taking water over the bow and over the wheelhouse. The wind was from the starboard bow. (TR. 17-18). Captain Sheppard had reduced speed making 6 to 8 miles per hour and had employed stabilizers[3] in an attempt to stabilize the boat. (TR. 18-19, 72). Captain Sheppard took over the watch in the wheelhouse at 0700 (TR. 20) and remained on watch in the wheelhouse until collision. (TR. 58).

3/ A stabilizer is a triangular shaped piece of metal pinned in the middle and with a nose weight. It is placed into the water by a chain at the end of the extended trawler outriggers. (see RA. 2). (TR. 18-19).

LARRY AND MABEL II was being steered by her auto pilot (TR. 27, 58). The auto pilot could be disengaged and the throttle pulled back within a second, and the trawler's headway could be stopped in less than a minute under existing weather conditions. (TR. 27-28). Captain Sheppard was standing lookout in the trawler's wheelhouse at the starboard window, which is the window position just over the "T" in the word TOM on PX. 8. (RA. 2). Captain Sheppard had a clear view to port and ahead, but with the constant shipping of water, the spray and the glare of the sun, visibility off the starboard bow of the trawler was difficult. (TR. 22-23). To maintain lookout to starboard Captain Sheppard continuously lowered the starboard window when the vessel was riding up a wave, and closed it when the vessel's bow once again plunged into a wave, approximately every ten seconds. (TR. 25, 53-54).

Captain Sheppard did not call out one of the crew members to act as a forward lookout on the bow or atop the wheelhouse because of the dangers presented by the sea conditions. The water was going from the bow of the boat all the way across the wheelhouse and along the entire starboard side of the trawler. (TR. 25-26, 55-57). Under existing conditions the lookout to starboard that Captain Sheppard was keeping from the wheelhouse was the best that could have been kept even if a crewman had been posted elsewhere on the vessel. (TR. 57). The trawler's wheelhouse was well foreward (RA. 1-2), and Captain Sheppard's position was only 12 feet or so aft of the bow where an outside lookout would ordinarily be placed. (TR. 25-26). Reino Taskinen confirmed that in the prevailing conditions it would have been dangerous, if not impossible, to post someone on top of the pitching wheelhouse because there was "...nothing to hang onto and the seas were going completely over the top of the wheelhouse." (TR. 80-82).

Third Mate Power aboard COVE RANGER sighted LARRY AND MABEL II and the DEBBIE AND ADDISON a full 20 minutes before collision. (TR. 82). By inspection with binoculars Mr. Power determined that LARRY AND MABEL II

was running into head seas and a northeasterly wind on a course of about 025 degrees at an estimated speed of 5 to 6 knots. (TR. 183). He knew the difference between trawler outrigger position while fishing and while using stabilizers, and determined that LARRY AND MABEL II and the DEBBIE AND ADDISON were not fishing. (TR. 182-183). Mr. Power observed no one on their decks and admitted that he observed they were taking a "lot" of spray. (TR. 192).

Rather than determining if risk of collision existed by actual visual bearings of the approaching vessels (TR. 105-106, 138-140) with COVE RANGER'S gyro repeaters and azimuth circles (TR. 93), Mr. Power continued to watch the fishing vessels by "lining them up" with a window frame on the tanker's bridge and "estimating" that their bearings were changing slightly to the left by about one or two degrees. (TR. 185-186). At some point Mr. Power said one of the trawlers passed across the bow of COVE RANGER and he continued to watch the other trawler approach and, on the basis of his "experience at sea" (TR. 188-189), he expected that it would "get close in" (TR. 187) before it turned to "drop under" the stern of COVE RANGER. (TR. 190-192).

At 0958 hours (18 minutes after the fishing vessels were first sighted) Mr. Power became alarmed and ordered the rudder of COVE RANGER hard right. (TR. 190). The effect of this maneuver was to pivot the COVE RANGER, throwing the side of the ship into the shrimp trawler in a crabbing motion. (TR. 154-156). Mr. Power did not blow any whistle signal at that time because "I forgot. I was in an excited state." (TR. 191, 196). Mr. Power admitted there was nothing preventing him from blowing a danger signal as early as 0940, or at any time prior to collision. (TR. 196). Captain Flannagan, Master of COVE RANGER, agreed that the shrimp vessel could have taken a number of actions to avoid collision had a danger signal been given by COVE RANGER even as late as 4 minutes prior to the accident. (TR. 99).

Captain Sheppard had kept the trawler's radio tuned to channel 16 except for brief radio reports and hourly checks with DEBBIE AND ADDISON. (TR. 25, 61-62). Mr. Power stated that he did not try to radio the vessels because, based on his "experience," fishing vessels never answered channel 16. (TR. 188-189). Captain Sheppard received no radio call and there was no whistle signal prior to his sighting COVE RANGER just prior to collision. (TR. 29-30). He called a warning to his crew (TR. 73) and immediately placed the trawler in reverse. (TR. 30, 74). The trawler was backing down when the end of the trawler's starboard outrigger was hit by the ship and the trawler's bow was swung to the right into the COVE RANGER'S side. (TR. 30-31).

Accepting the evidence above stated, as outlined in the post-trial brief and summary adopted by the District Court as the Appendix to its Memorandum decision (PA. 7a - 8a, 10a - 14a), the District Court rejected the Petitioners' contention that Rule 5, 33 U.S.C. §1602 (*supra*, p. 1) had been violated:

> Based upon all the evidence in this case, however, it was my conclusion at the trial that the failure to post a lookout was excusable but that the failure of the Third Mate on the S/S Cove Ranger to sound a danger signal and to give a one blast signal thereafter was the sole and proximate cause of the disaster. It is, of course, true that the vessels were in the traffic shipping lane on a bright clear day, but the construction and size of the trawler moving in heavy seas with a constant spray over her bow was ample reason for the lack of a lookout. A lookout on the trawler would have been in a dangerous position during the interval prior to the collision. (PA. 7a).

The Lookout Issue in the District and Circuit Courts

The present Petition is predicated upon the assertion that the District Court found "...that the *Respondent* had failed to post a lookout at the time of the collision." (Petition, p. 6). The issue with respect to the LARRY AND MABEL II was not a *failure* to post a lookout, nor did the District Court find a failure

to post a lookout. The issue was the appropriateness of the lookout kept by Captain Sheppard of LARRY AND MABEL II under the sea conditions existing at the time. (PA. 5a - 7a, 13a - 14a).

As confirmed by the memorandum summary by Respondent's Counsel, adopted by the District Court "...as being a correct summary of the evidence and conclusions..." (PA. 7a), the District Court's statement that "...the failure to post a lookout was excusable..." (PA. 7a) was but a reference to the position of Captain Sheppard under existing sea conditions within the requirements of Rule 5, 33 U.S.C. §1602. (*Supra*, p. 1). (PA. 7a, 13a - 14a). As stated therein and accepted and adopted by the District Court:

> The fact is LARRY AND MABEL II did have a lookout and that lookout, Captain Sheppard, was positioned and keeping the best lookout which the existing circumstances permitted. (PA. 14a).

The initial Brief of the Appellants in the Eleventh Circuit had posited the lookout issue as follows:

> WHETHER THE F/V LARRY AND MABEL II WAS REQUIRED TO MAINTAIN A PROPER LOOKOUT AT ALL TIMES IRRESPECTIVE OF THE SEA AND WEATHER CONDITIONS. (Brief of the Appellants, pp. 5, 10).

Petitioners' argument as Appellants in their initial Brief, in one page (Brief of Appellants, p. 10), was that the District Court's determination that "...a lookout on the trawler would have been in a dangerous position during the interval prior to the collision" (PA. 7a) was clearly erroneous under the requirements of Rule 5, 33 U.S.C. §1602 (*supra*, p 1), which Petitioners argued required posting of an outside lookout regardless of the prevailing circumstances.

The assertion in the Petition that the District Court in fact determined that there was a failure to post a lookout is exactly

contrary to the admission in the Petitioners' Reply Brief in the Eleventh Circuit, at page 2:

> . . . the District Court concluded that the LARRY and MABEL II had kept a proper lookout under all the circumstances, and assigned the COVE RANGER sole fault in the collision for failing to earlier take evasive action and to sound a danger blast and other signals.

Abandoning the factual contentions and arguments asserted in their initial Brief in the Eleventh Circuit, the Petitioners, in their Reply Brief, asserted the *PENNSYLVANIA* Rule[4] for the first time, not as an issue of fact, but as an issue of law supposedly to be applied to the facts as found by the District Court. Page 4 of that Reply Brief stated:

> Appellants do not argue, however, that the District Court's findings of facts relating to the events preceding and during the collision are without support in the Record.

4/ *The Steamship PENNSYLVANIA v. Troop*, 86 U.S. (19 Wall.) 125, 22 L.ed. 148 (1874).

SUMMARY OF ARGUMENT

Contrary to the claim of the present Petition, neither the District Court nor the Eleventh Circuit Court of Appeals has stated that the evidentiary and procedural rule of *The Steamship PENNSYLVANIA v. Troop*, 86 U.S. (19 Wall.), 125, 22 L.ed. 148 (1874), does not continue to be the law of the sea. The conflict asserted by Petitioners does not exist. This Court historically does not sit as a trier of fact to resolve disputes of interest only to the parties involved. The present Petition presents no basis for the exercise of this Court's discretion. The *PENNSYLVANIA* Rule shifts the burden, to one who is in actual violation of a statutory rule intended to prevent collisions, to rebut a presumption of fault by proving that such violation could not have been a proximate cause of the accident. Where, as here, there has been no statutory violation, the *PENNSYLVANIA* Rule is inoperable

International Rule 5, 33 U.S.C. §1602 (*supra*, p. 1) was not violated by LARRY AND MABEL II. Rule 5 does not require the posting of an outside lookout irrespective of the sea and weather conditions. The determination that the wheelhouse position and the visibility afforded Captain Sheppard was as good as anybody who could have been posted elsewhere as a lookout, and that posting a lookout forward or atop would have been dangerous under the sea conditions, was based on facts uncontradicted in the Record and affirmed under the clearly erroneous standard of review. Accordingly, in the absence of a violation of Rule 5, the *PENNSYLVANIA* Rule cannot be invoked.

This case presents no basis for application of the *PENNSYLVANIA* Rule - *a fortiori* it presents no basis for resolving an alleged conflict between circuits as to the applicability or validity of the *PENNSYLVANIA* Rule.

ARGUMENT

THE OPINION IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DOES NOT CONFLICT WITH *THE STEAMSHIP PENNSYLVANIA v. TROOP*, 86 U.S. (19 Wall.) 125, 22 L.ed. 148 (1874). IN THE ABSENCE OF A STATUTORY VIOLATION THE *PENNSYLVANIA* RULE CANNOT BE INVOKED. THE DETERMINATION OF A STATUTORY VIOLATION IS A QUESTION OF FACT FOR THE DISTRICT COURT UNDER THE TERMS OF THE PARTICULAR STATUTE INVOLVED AND THAT DETERMINATION IS NOT TO BE DISTURBED UNLESS CLEARLY ERRONEOUS.

The assertion that this case somehow presents a conflict with the procedural and evidentiary rule enunciated in *The Steamship PENNSYLVANIA v. Troop*, 86 U.S. (19 Wall.) 125, 22 L.ed. 148 (1874), and the myriad other decisions cited in the Petition which have followed and/or applied the *PENNSYLVANIA* Rule since its inception, is without legal or factual foundation. Neither the District Court's Memorandum decision nor the Circuit Court's Per Curiam affirmance represent any jeopardy to the *PENNSYLVANIA* Rule. Petitioners lose sight of the fact that this Court does not exist as a "super" appellate court, nor are the United States Courts of Appeals to be utilized as mere way stops on the road to the Supreme Court.[5]

As this Court has time and again admonished, its certiorari jurisdiction with respect to conflict claims is meant to settle "real and embarrassing" conflicts between the Circuits involving principles ". . . which [are] of importance to the public as distinguished from that of the parties." *Layne & Bowler Corporation v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S.Ct. 422, 67 L.ed. 712, 714 (1923); *Rice v. Sioux City Cemetery*, 349 U.S. 70,

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5/ *See e.g., Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 93 L.ed. 672, 677 (1948); *Southern Power Company v. North Carolina Public Service Company*, 263 U.S. 508, 44 S.Ct. 164, 68 L.ed. 413 (1923).

79, 75 S.Ct. 614, 99 L.ed. 897, 904 (1955). This Court does not grant certiorari to review evidence and discuss specific facts, especially when the facts which control are subject to the clearly erroneous rule and are of importance only to the specific litigation.[6]

As with *Southern Power Co. v. North Carolina Public Service Co., supra,* the allegedly grave question presented by the issue stated in the Petition does not exist. Petitioners, by a selective presentation of facts and a selective quoting of a portion of the Memorandum findings and decision of the District Court (PA. 4a - 16a), out of context, allege a finding by the Trial Court of a violation of International Rule 5, 33 U.S.C. §1602 (*supra,* p. 1), in order to assert that the *PENNSYLVANIA* Rule has been violated.[7]

The *PENNSYLVANIA* Rule requires first that there be an "...actual violation of a statutory rule..."[8] before the presumption of fault arises and the burden of proving the violation could not have been a cause is shifted. In *Richelieu and Ontario Navigation Company v. The Boston Marine Insurance Company,* 136 U.S. 408, 422, 10 S.Ct. 935, 34 L.ed. 398, 403

6/ *United States v. Johnston,* 268 U.S. 220, 45 S.Ct. 496, 69 L.ed. 925 (1925); *Rudolph v. United States,* 370 U.S. 269, 8 L.ed.2d 484, 82 S.Ct. 1277 (1962); *Southern Power Co. v. North Carolina Public Service Co., supra; N.L.R.B. v. Pittsburgh S.S. Co.,* 340 U.S. 498, 503, 71 S.Ct. 453, 95 L.ed. 479, 482 (1951).

7/ *Had* the District Court found a violation of Rule 5, the statement of Respondent's Counsel in the Appendix to the District Court's Memorandum Decision (PA. 13a), that it was Defendants' (Petitioners here) burden "...to also establish that such failure contributed to the collision", might have been actionable error. The selective editing of the Memorandum findings of the District Court in the Petition to this Court, to assert a factual finding by the District Court of the *statutory* failure to post a lookout when it clearly made no such findings, as Petitioners admitted in their Reply Brief in the Eleventh Circuit, renders the erroneous statement of the burden totally inconsequential with respect to the actual issue and facts confronting the District Court and the Court of Appeals. In the absence of an initial statutory violation, necessary to invoke the *PENNSYLVANIA* Rule, the erroneous statement is harmless. *See, Candies Towing Co., Inc. v. M/V B & C ESERMAN,* 673 F.2d 91, 95 (5th Cir. 1982).

8/ 86 U.S. (19 Wall.) at 136; 22 L.ed. at 151.

(1890), the term "positive breach of statute" was used. It is not a rule of liability, it only shifts the burden of proof as to causation. *E.g., The AAKRE*, 122 F.2d 469 (2nd Cir. 1941), cert. denied, sub nom. *Waterman v. The AAKRE*, 314 U.S. 690, 62 S.Ct. 360, 86 L.ed. 552 (1941); *Green v. Crow*, 243 F.2d 401 (5th Cir. 1957); *Orange Beach Water, Sewer and Fire Protection Authority v. M/V ALVA*, 680 F.2d 1374 (11th Cir. 1982); *Florida East Coast Railway Company v. Revilo Corporation*, 637 F.2d 1060 (5th Cir. 1981).

The determination of whether or not a statutory fault has occurred, as a necessary prerequisite for application of the *PENNSYLVANIA* Rule burden, is a question of fact to be decided by the District Court under the particular circumstances of each case. Upon review the findings are subject to the clearly erroneous doctrine. *E.g., Oriental Trading and Transport Co. v. Gulf Oil Corporation*, 173 F.2d 108 (2nd Cir. 1949), cert. denied, sub nom. *Gulf Oil Corporation v. The JOHN A. BROWN*, 337 U.S. 919, 69 S.Ct. 1162, 93 L.ed. 1728, (1949); *The First National Bank of Chicago v. Material Service Corporation*, 597 F.2d 1110, 1116 (3rd Cir. 1979); *Osaka Shosen Kaisha, Ltd. v. Angelos Leitch & Co., Ltd.*, 301 F.2d 59 (4th Cir. 1962); *Wilson v. Oil Transport Company, Inc.*, 242 F.2d 727 (5th Cir. 1957), cert. denied, 355 U.S. 835, 78 S.Ct. 56, 2 L.ed. 2d 46 (1959); *China Union Lines, Ltd. v. A. O. Andersen & Co.*, 364 F.2d 769 (5th Cir. 1966), cert. denied, 386 U.S. 933, 87 S.Ct. 955, 17 L.ed.2d 805 (1967); *Orange Beach Water, Sewer and Fire Protection Authority v. M/V ALVA, supra; see also, United States v. Adams*, 376 F.2d 459 (3rd Cir. 1967).

Whether or not there has been a statutory violation depends upon the facts of the particular case measured against

the particular statutory rule at issue.[9] Rule 5 (*supra*, p. 1) is not, by its very wording, a command to post a lookout on the bow or outside under *all circumstances*. It does require a lookout "...appropriate in the prevailing circumstances and conditions...". The present Rule, enacted in 1972, is far more definitive than former Rule 29. Even under former Rule 29 as held in *Darling v. Scheimer*, 444 F.2d 514 (9th Cir. 1971), the lookout duty does not apply "...under any and all circumstances". The Court there held, in a collision case, that there was no statutory duty to post a lookout on boats of a fishing fleet which had shut off their engines for the night and were drifting 35 miles off the coast in open seas. The boats had mast lights and side navigation lights burning on a clear moonlit night with 6 to 10 mile visibility in a flat calm, offering a clear view to others.[10]

9/ While COVE RANGER'S failures are not directly here at issue, the Petition's preoccupation with the "stand-on" and "give-way" situation is presented in a factual vacuum which ignores the COVE RANGER'S many failures (PA. 6a) which were governed by Rules 7(a), (c) and (d), 8(a), (c) and (e), 17 and 34(a) and (d), International Regulations for Preventing Collision at Sea (1972), 33 U.S.C. §1602. As governed by these and other regulations, and as held by the District Court (PA. 6a), no vessel has the right to insist upon the "right-of-way into collision." *E.g., Crawford v. Indian Towing Company*, 240 F.2d 308, 311 (5th Cir. 1957), cert. denied, 353 U.S. 958, 77 S.Ct. 865, 1 L.ed.2d 909 (1957). The United States Coast Guard's Comment to Rule 17 ("stand on"/"give-way" vessel) states:

> The "privileged vessel" is now defined as "stand-on vessel." Provision is now made for the stand-on vessel "to avoid collision by her maneuver alone". Provides for maneuver by the stand-on vessel based upon his own capabilities, rather than his assessment of the "give-way" vessel's capabilities. A significant reform of the rule that allows action by the "stand-on vessel" prior to the "in extremis" situation.
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> [United States Coast Guard Publication, Navigational Rules, CG-169 (May 1, 1977), p. 21]

10/ Former Rule 29, International Rules for Navigation at Sea, Act Oct. 11, 1951, c. 495, §6, Part D, 65 Stat. 419-420, repealed, Pub. L. 88-131, §3, 77 Stat. 194, provided:

> Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Historically, weather and sea conditions have been primary factors in determining whether or not there has been a violation of the lookout duty, statutory or otherwise. The decision is committed to the captain of the particular vessel under the conditions being encountered by the vessel. *E.g., The KAISERIN MARIA THERESA*, 149 F. 97 (2nd Cir. 1906), cert. denied, sub nom. *Palson v. North German Lloyd*, 204 U.S. 671, 27 S.Ct. 786, 51 L.ed. 673 (1907), (removal of bow lookout due to coldness of weather and freezing of spray); *The CARO*, 23 F. 734 (E.D. N.Y. 1884) (a lookout kept from pilot house 15 feet from the bow, when man if placed on bow would have been in danger of being washed over, is not a fault); *Boston Maritime Corporation v. Ocean's S. Co. of Savannah*, 17 F.2d 804 (D.C. Mass. 1927) (steamship not at fault because of having placed lookout in bow where wind and spray interfered with his ability to see in heavy weather); *Wood v. United States*, 125 F.Supp. 42, 51 (S.D. N.Y. 1954) (recognizing the weather exception to the duty of a bow lookout under former Rule 29); *La InterAmericana, S.A. v. Narco*, 146 F.Supp. 270, 273 (S.D. Fla. 1956), rev'd on other grounds, sub nom. *Nardelli v. Stuyvesant Insurance Company of New York*, 258 F.2d 718 (5th Cir. 1958), modified on other grounds, 269 F.2d 592 (5th Cir. 1959) (recognizing that statute does not invariably demand a separate lookout on bow and the conditions of sea and weather can excuse necessity for separate lookout). As stated in *Oriental Trading & Transport Co. v. Gulf Oil Corporation, supra*, at 111:

> Although a lookout is one of the most essential safeguards on a ship, nothing could less insure his value than rigidly to circumscribe his functions. Normally, he would indeed be stationed in the bow; because there his view is not obstructed, and apparently he can see better when close to the water than aloft. However, all considerations yield, when the weather makes another position more suitable. It would be fatuous to the last degree to insist upon his being on the forecastle, where rain or sleet or even high winds in his face interfere with his vision. Both ships were sheltering their lookouts - a good indication that that was a reasonable precaution.

Here the District Court found that there was no violation of Rule 5 by maintaining a lookout from the wheelhouse, due to the dangerous conditions represented by the sea in relation to a small fishing vessel which was pitching and rolling and taking water over her bow. As the evidence fully supported, as admitted in the Petitioners' Reply Brief in the Eleventh Circuit, positioning a lookout atop the wheelhouse or on the bow would have been dangerous. Apart from the fact of a guaranteed impairment of his vision by wind and constant salt water, *see, Boston Maritime Corporation v. Ocean's S. Co. of Savannah, supra,* a man posted on top of the wheelhouse or in the bow would have been fully occupied in trying to keep from going over the side as the trawler pitched and rolled and shipped water. It was uncontradicted that under the sea conditions facing LARRY AND MABEL II the wheelhouse was the only available position, and that Captain Sheppard's visibility was as good as anyone he could have posted. (TR. 57). The situation here was not any different than that in *The CARO, supra.*

Petitioners' assertion that the District Court found a statutory violation of Rule 5 and failed to apply the procedural requirements of the *PENNSYLVANIA* Rule is without merit. The procedural and evidentiary mandates of the *PENNSYLVANIA* Rule never arose because of the absence of proof of a statutory violation necessary to the invocation of the *PENNSYLVANIA* Rule. This was a necessary preliminary factual determination subject to the clearly erroneous standard, which Petitioners admit was fully supported by the Record.

Petitioners seek to use this Court only as a second appellate body to review an issue of fact. The decision below has neither eroded nor affected the *PENNSYLVANIA* Rule and is not in conflict with decisions from other Circuits.

CONCLUSION

The *PENNSYLVANIA* Rule is alive and well in the Eleventh Circuit; the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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NO. 82-1583

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

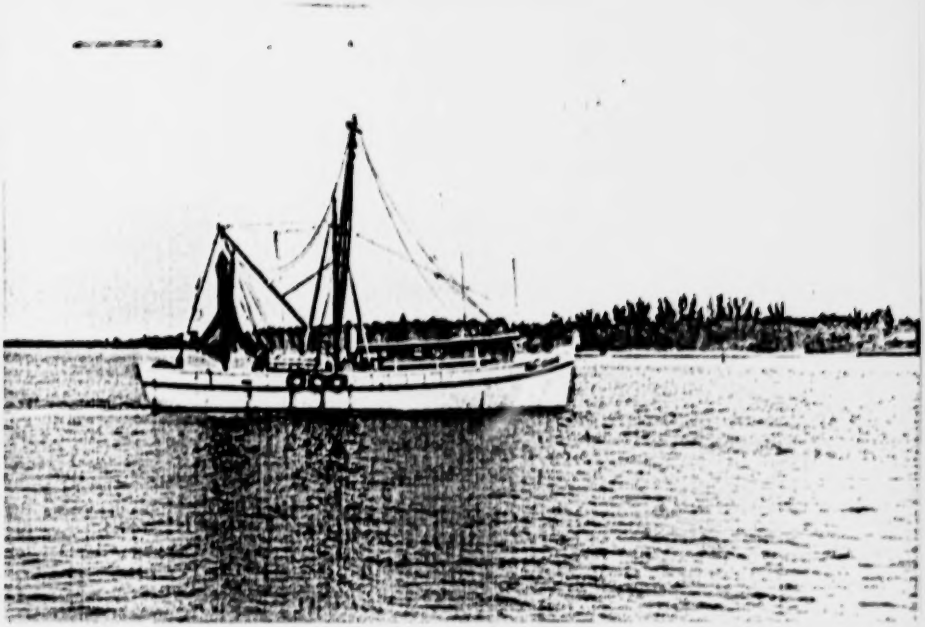
S/S COVE RANGER, her engines tackle, boilers, equipment, furnishings *in rem*, COVE SHIPPING COMPANY, INC., C. M. C. TANKERS and C. T. S. ASSOCIATES, *in personam*,
Petitioners,

v.

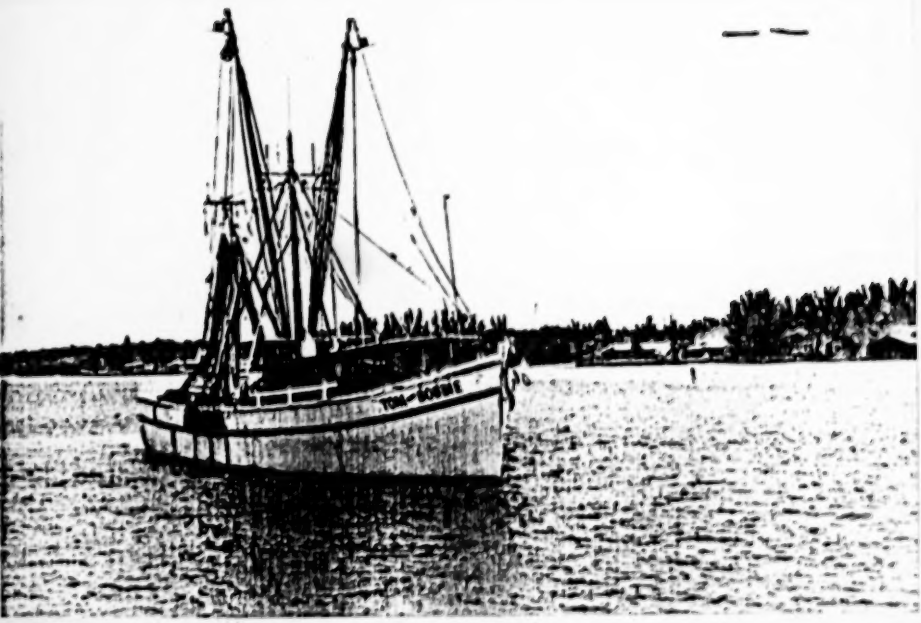
ST. GEORGE PACKING COMPANY, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO BRIEF FOR RESPONDENT, ST. GEORGE PACKING COMPANY, INC., IN OPPOSITION



Plaintiff's Exhibit 7



Plaintiff's Exhibit 8